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No. 93-1519

In the Supreme Court of the United States

OCTOBER TERM, 1993

FAIRFAX HOSPITAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the finding of the National Labor Relations Board (Board) that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by selectively and disparately enforcing a no solicitation/no distribution rule is consistent with Section 8(c) of the Act, 29 U.S.C. 158(c), and *NLRB* v. *United Steelworkers (NuTone, Inc.)*, 357 U.S. 357 (1958).

2. Whether the Board's finding of a violation of Section 8(a)(1) based on petitioner's photographing and surveillance of union activities conducted on public property adjacent to the hospital is consistent with *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841 (1992).

3. Whether the Board's finding of a violation of Section 8(a)(1) based on petitioner's selective and disparate enforcement of an off-duty employee access rule is consistent with *Lechmere, Inc.* v. *NLRB*, *supra*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is unpublished, but the judgment is noted at 14 F.2d 594 (Table).[1] The decision and order of the National Labor Relations Board (Pet. App. A27-A36) and the decision of the administrative law judge (Pet. App. A37-A86) are reported at 310 N.L.R.B. 299.

[1] On December 22, 1993, the court denied the Board's motion (Pet. App. A89-A91) for publication of the court's opinion.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1993. A petition for rehearing was denied on January 4, 1994. Pet. App. A87-A88. The petition for a writ of certiorari was filed on March 25, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a large hospital in Fairfax, Virginia (the Hospital). In the summer of 1988, the District of Columbia Nurses Association (the Union) began an effort to organize petitioner's registered nurses (RNs). Pet. App. A37-A39, A41.

In September, petitioner learned of the organizing effort. Pet. App. A3, A41. Shortly thereafter, petitioner promulgated an "Off-Duty Employee Access Rule" prohibiting off-duty employees from entering or returning to Hospital property except to visit a patient, receive medical treatment, or conduct hospital-related business, which was defined as "the pursuit of the employee's normal duties or duties as specifically directed by management." *Id.* at A6 & n.2, A59. Petitioner did not follow its normal method of dissemination of the new rule and most RNs were unaware of its existence.[2] Petitioner selectively

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[2] Petitioner's usual policy with respect to the dissemination of newly promulgated rules was to distribute to employees a memorandum advising them of the new rule and to place copies of the new rule in policy books maintained by nursing coordinators in the various nursing units throughout the Hospital. In this instance, however, no memorandum was circulated and no copies of the rule were placed in policy books. Rather, a copy of the rule was initially posted only in the

enforced the new no-access rule. Off-duty RNs, without incident, returned to the Hospital to attend baby showers, parties, luncheons, and social and athletic events; to conduct credit union business; to pick up merchandise they had purchased from fellow workers; and to use the hospital library. RNs who returned to distribute union literature, however, were asked to leave, disciplined, or both. *Id.* at A64-A65. Three RNs were disciplined for leafleting for the Union on public sidewalks outside the Hospital during their non-working time. They were each given a written disciplinary warning that stated that the warning constituted the second phase of the disciplinary process and any further violations could lead to further disciplinary action. *Id.* at A63-A64.

Since November 1986, petitioner had in effect a policy prohibiting employees from soliciting or distributing literature for any purpose during working time on hospital premises and in designated patient care areas. Solicitation was permitted in cafeterias, lobbies, gift shops, lounges, locker rooms, rest rooms, and parking lots. Violations of the policy would result in discipline. Pet. App. A8, A9, A68-A71. The rule, however, was not strictly enforced. In fact, no one had ever been warned or disciplined for advertising or selling T-shirts, gift wrap, candy, Tupperware, cosmetics, cookies, fruit, plants, flowers, baskets, or tote bags throughout the Hospital in open view of patients in prohibited areas. *Id.* at A9 & n.6, A71. Petitioner, however, vigorously suppressed solicita-

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Hospital's staffing office, where rules were not usually posted. As of the summer of 1989, most RNs remained unaware of the new rule. Pet. App. A60-A61.

tion for the Union. Although the rule permitted solicitation in nurses' lounges, nurses were warned not to distribute pro-union literature in the lounges and were disciplined for doing so. While other literature was allowed to remain in the lounges, any union literature was quickly confiscated by petitioner. *Id.* at A71-A72.

On May 5, 1989, about 30 RNs and other Union supporters distributed packets of union materials on the public sidewalks and roads around the perimeter of the Hospital. Petitioner hired photographers to photograph and videotape the participants, and hospital supervisors rode in cars with the photographers to tell them which people to photograph and to observe the leafleting. Pet. App. A65-A66.

The Union filed charges with the National Labor Relations Board (the Board), alleging, *inter alia*, that, by the foregoing conduct, petitioner had violated Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1).[3] Based on those charges, the Board's General Counsel issued a complaint. Pet. App. A38 n.2.

2. After a hearing, the Board's administrative law judge (ALJ) concluded, *inter alia*, that petitioner had violated Section 8(a)(1) of the Act in several respects. Pet. App. A37-A86.

The ALJ found that petitioner's rule denying access to off-duty employees violated the principles

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[3] Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 U.S.C. 157]." Section 7 rights include the right "to self-organization" and "to form, join, or assist labor organizations."

announced in *Tri-County Medical Center, Inc.*, 222 N.L.R.B. 1089 (1976), because the rule was not clearly disseminated to all employees, Pet. App. A60-A61; was not shown, as petitioner had claimed, to be necessary to alleviate alleged parking shortages and crime in the Hospital's parking lots, *id.* at A62-A63; and was applied only to those off-duty employees who came to the Hospital to engage in union activity, *id.* at A64-A65. In particular, the ALJ found that petitioner routinely allowed off-duty employees to return to the Hospital for a variety of reasons unrelated to work, but disciplined only those off-duty employees returning to the Hospital to engage in union activities. *Ibid.*

The ALJ further found that petitioner's no solicitation/no distribution rule was disparately and selectively enforced against union advocates in violation of the Act. Solicitations and distributions of all sorts occurred throughout the Hospital and "sometimes in open view of patients," and no one "had ever been disciplined for advertising or selling any of these products." Pet. App. A71. Citing *NLRB* v. *United Steelworkers (NuTone, Inc.)*, 357 U.S. 357, 364 (1958), the ALJ recognized that, "absent evidence that a union does not have sufficient means to communicate with the employees, an employer does not violate the Act by enforcing a valid no-solicitation rule while engaging in antiunion solicitation of its own." Pet. App. A73. The ALJ also recognized that, because of the special requirements of a hospital, organizational activity by off-duty employees may be limited in patient-care areas. The ALJ concluded, however, that because petitioner engaged in antiunion activities in patient-care areas, its conduct indicated that solic-

itation by employees in the same areas would not disrupt the delivery of medical care. The ALJ therefore found that petitioner's application of its no-solicitation rule violated the Act. *Id.* at A73-A74.

Finally, the ALJ found that petitioner's acts of photographic and personal surveillance violated the Act. The ALJ noted that under *Hoschton Garment Co.*, 279 N.L.R.B. 565, 567 (1986), an employer may not use "patrolling cars, cameras, and videotapes to enhance its identification of those who are lawfully engaging in protected Section 7 conduct." Referring to the evidence that established that the demonstrators here did not engage in trespasses, work stoppages, strikes, violence, or improper conduct, the ALJ concluded that petitioner's alleged concerns about the demonstrators "were at best fabricated," and that there was "nothing to justify [petitioner's] repeated surveillance." Pet. App. A66-A67.[4]

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[4] The ALJ also found that petitioner violated Section 8(a)(1) of the Act by selectively and disparately maintaining and enforcing rules concerning employee bulletin boards and mailboxes when it removed union-related notices while permitting nonunion-related notices to remain, and by selectively and disparately enforcing a rule regarding the wearing of union pins in patient care areas when it told RNs to remove union pins while permitting them to wear nonunion and nonhospital-related pins and buttons. The ALJ further found that petitioner violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), by discriminatorily discharging an RN who was a leader of the organizing campaign because of her activities on behalf of the Union and by disciplining nurses for violating its discriminatorily enforced rules. The Board affirmed those findings and the court of appeals upheld the Board's order. Pet. App. A26. Petitioner does not raise any of those issues in this Court.

The Board affirmed the ALJ's unfair labor practice findings at issue here and adopted his recommended order as it applied to those issues. Pet. App. A27-A28, A36.

3. The court of appeals affirmed the Board's unfair labor practice findings and enforced its order. Pet. App. A1-A26. The court agreed with the ALJ and the Board that petitioner's maintenance and enforcement of its no solicitation/no distribution rule violated Section 8(a)(1) of the Act. In so holding, the court recognized that "[a]n employer does not violate the Act by enforcing a valid no solicitation rule pertaining to on-duty employees while engaging in antiunion solicitation of its own." Pet. App. A19-A20, citing *NLRB* v. *United Steelworkers of America (NuTone, Inc.)*, *supra*. The court also recognized, however, that, while a hospital may restrict solicitation and distribution in patient care areas "because of problems with disruption of patient care," a prohibition against "distribution or solicitation on nonwork time in nonworking areas is presumptively invalid unless the hospital demonstrates that the prohibition is necessary to avoid disruption of health care operations or disturbance of patients." Pet. App. A19, citing *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 491-492 (1978).[5] The court further noted that, in such situations, "[t]he hospital bears the burden of proving that the prohibition is necessary to lessen disruption to patients." Pet. App. A19, citing *Beth Israel*, 437 U.S. at 507.

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[5] Generally, employers cannot adopt rules prohibiting solicitation on nonworking time or distribution on nonworking time in nonworking areas. *Beth Israel*, 437 U.S. at 492-493 & n.10.

The court determined that petitioner's "antiunion solicitations in areas barred to Union sympathizers indicates that [petitioner] never needed to apply the rule in those areas." Pet. App. A20. Accordingly, the court concluded that petitioner failed to justify its no solicitation rule under *Beth Israel* because it "knew that no disruption of patient care would occur from solicitation in banned areas, such as nurses' stations." *Ibid.* In addition, the court upheld the Board's finding that petitioner applied its rule disparately. *Id.* at A21. Petitioner "allowed the sale of many nonhospital-related commercial products * * * in banned areas." *Ibid.* And while the rule permitted distribution of material in the nurses' lounges and petitioner permitted nonunion material to be distributed there, petitioner told some nurses "to cease bringing Union material to the building," and "others were prohibited from distributing Union material in nurses' lounges." *Ibid.*

Finally, the court noted that petitioner asserted "numerous arguments in an attempt to prevent enforcement of the Board's order with respect to [its] surveillance of Union activities and the Off-Duty Access Rule," but it found petitioner's contentions with respect to those violations "without merit." Pet. App. A26.

ARGUMENT

1. Petitioner contends (Pet. 8-11) that the court of appeals' holding that the Hospital enforced its no solicitation/no distribution rule disparately, in violation of Section 8(a)(1) of the Act, infringed petitioner's right of free speech under Section 8(c) of the Act,

29 U.S.C. 158(c),[6] and conflicts with *NLRB* v. *United Steelworkers (NuTone, Inc.)*, 357 U.S. 357 (1958). There is no merit to that contention.

Nutone, Inc., addressed the "very narrow and almost abstract question" of whether, where an employer has a valid rule barring employees from engaging in union solicitation during working time, its enforcement of the "otherwise valid no-solicitation rule * * * is itself an unfair labor practice" when the employer conducts "anti-union solicitation that if engaged in by employees would constitute a violation of the rule." 357 U.S. at 362. The Court declined to rule that "the coincidence of these circumstances necessarily violates the Act, regardless of the way in which the particular controversy arose or whether the employer's conduct to any considerable degree created an imbalance in the opportunities for organizational communication." *Ibid.* The Court left it primarily to the Board "to appraise carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases and in light of the Board's special understanding of these industrial situations." *Id.* at 362-363.

The Board has struck a balance in the health care field that permits a hospital to prohibit employee solicitation and literature distribution during nonworking time in immediate patient care areas, but

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[6] Section 8(c) provides that:

> The expressing of any views, argument, or opinion * * * shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

requires the hospital to demonstrate that a broader rule prohibiting union solicitation and distribution of union literature during nonworking time in other areas of the hospital is necessary to avoid disruption of health-care operations or disturbance of patients. This Court has approved the Board's policy as consistent with the Act. See *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 497-500, 507 (1978); *NLRB* v. *Baptist Hospital, Inc.*, 442 U.S. 773, 779 (1979). The court of appeals correctly concluded that the Board properly applied that policy to the facts of this case.

While prohibiting union adherents from distributing their pro-union materials anywhere in the Hospital, petitioner itself distributed antiunion literature to RNs while they were working in banned areas, such as nurses' stations. Thus, as the court of appeals found (Pet. App. A20-A21), petitioner, far from meeting "its burden of proving that the prohibition on solicitation is necessary to lessen disruption to patients," has, "[b]y its actions, * * * demonstrated there was no need for the rule." Moreover, as the court further noted (*id.* at A21), petitioner "disparately applied the [r]ule," allowing "many non-hospital-related commercial products * * * in banned areas" while prohibiting nurses "from distributing Union material in nurses' lounges." *Ibid.* In those circumstances, the Board reasonably concluded that petitioner's maintenance and enforcement of its no solicitation/no distribution rule violated Section 8(a)(1) of the Act.

Contrary to petitioner's contention (Pet. 10-11), the Board's decision does not restrict its Section 8(c) right to campaign against the Union during the

employees' working time in any area of the facility that it chooses. But when a hospital prohibits employee solicitation and literature distribution in certain areas because it asserts that such activity in those areas would disrupt patient care, the hospital cannot then distribute its antiunion materials, and permit employees to engage in other hospital-related solicitation and distribution in the same areas without undermining, if not wholly discrediting, its assertion that pro-union solicitation and literature distribution there would be disruptive to patients.

2. Petitioner also contends (Pet. 11-13) that its right to observe and photograph union demonstrators is protected under *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841 (1992). Petitioner's reliance on *Lechmere* is misplaced.

Lechmere addressed the balance to be struck when nonemployee union organizers seek access to the employer's private property. 112 S. Ct. at 845-846, 848. Here, the union demonstration was confined to county sidewalks and roads adjacent to the Hospital. Pet. App. A65-A66. Thus, there was no private property right at stake. Indeed, in *Lechmere*, the Court recognized that no balancing would have been required if the nonemployee union organizers had restricted their activity to "the public grassy strip adjoining Lechmere's parking lot." 112 S. Ct. at 850.

Petitioner errs in contending (Pet. 11) that the court of appeals' decision conflicts with *Oakwood Hospital* v. *NLRB*, 983 F.2d 698 (6th Cir. 1993), and a prior decision of the Fourth Circuit, see *NLRB* v. *Southern Maryland Hospital Center*, 916 F.2d 932

(1990).[7] In both of those cases, the union organizers were conducting their organizational activities on the hospital's property, specifically, the hospital cafeteria. *Oakwood*, 983 F.2d at 703; *Southern Maryland*, 916 F.2d at 936-939. Here, the pro-union demonstration was held on public sidewalks and roads adjacent to the Hospital.

3. Petitioner contends (Pet. 13-14) that the Board erred in its analysis of whether petitioner's enforcement of its limitation on access to the Hospital by off-duty employees violated the Act. Quoting *GTE Lenkurt, Inc.*, 204 N.L.R.B. 921, 921-922 (1973), petitioner contends (Pet. 13) that the Board has ruled that "the status of an off-duty employee 'is more nearly analogous to that of a non-employee'" than to an employee who is on the premises to work. Accordingly, petitioner argues (*ibid.*) that, in evaluating access limitations placed on off-duty employees, the Board must weigh the employer's private property rights in the balance.

The Board, however, has specifically limited the reach of the *GTE Lenkurt* standard for access by off-duty employees, holding that an employer may enforce a rule barring off-duty employees access to its premises if the rule

> (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those

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[7] Any intra-circuit conflict with a Fourth Circuit decision would not warrant review of the decision below in any event.

> employees engaging in union activity. * * * [E]xcept where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.

Tri-County Medical Center, Inc., 222 N.L.R.B. 1089, 1089 (1976). Petitioner contends (Pet. 14) that the *Tri-County* standard for assessing the validity of off-duty employee access rules is "inappropriate" in light of this Court's holding in *Lechmere*. According to petitioner (Pet. 14), the Board should not review the reasonableness of the employer's business justification, but should focus on whether the off-duty employees have an adequate alternative means to communicate their message to other employees.

It is doubtful that *Lechmere*'s standard for addressing the access rights of nonemployee union organizers should be extended to govern the access rights of off-duty employees (whose own Section 7 rights are at stake and may be furthered by organizational activity). This case, however, does not squarely present that issue. Even if the *Lechmere* approach were applicable, the Board's finding of a violation here is justified, because petitioner's rule was discriminatorily applied. Petitioner allowed off-duty employees access to its premises for numerous activities that were unrelated to work and denied access only to those off-duty employees engaging in activities on behalf of the Union. As *Lechmere* reaffirmed, even a nonemployee organizer is entitled to access when the employer's no-access rule is discriminatorily applied. 112 S. Ct. at 847; see also

NLRB v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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